RECENT DECISIONS.

ADMINISTRATION—BONA VACANTIA. A person domiciled in Austria died intestate and without kin, leaving personal property in England. *Held*, the property went to the English crown and not to the Austrian government. *In re Barnett's Trusts*, [1902] 1 Ch. 847.

It was contended that by the Austrian law the Austrian finance minister was the legal personal representative of the deceased and was entitled under the maxim *mobilia personam sequuntur*. The basis of this claim was that there was a right of succession, that the crown took as "ultimate heir." But the court remarked upon the inaccuracy of that expression, and pointed out that the Austrian minister in no way represented the person of the deceased. Consequently there was no *persona* to follow. The king takes title to *bona vacantia* not as heir but in the exercise of his royal prerogative. 1 Bl. Com. 298; *Public Administrator* v. *Hughes* (N. Y. 1850) 1 Bradf. 125; *State* v. *Ames* (1871) 23 La. Ann. 69. For the conflicting claims of the crown and the ordinary, and the jurisdiction of the latter, see *Hensloe's Case* (1600) 5 Co. Rep. 36; 2 Bl. Com. ch. 32; and especially *Dyke* v. *Walford* (1846) 5 Moo. P. C. 434, where, as KEKEWICH, J., says, may be found all the learning on the subject of *bona vacantia*.

AGENCY—APPARENT AUTHORITY—FRAUD. The plaintiffs stored timber with a dock company and gave the company authority to accept, for the transfer or delivery of the timber, orders signed by a certain clerk in the plaintiffs' employ, whom they authorized to sell timber as their agent. This clerk, in fraud of the plaintiffs, signed an order for the transfer of the timber to a fictitious person in whose name he both sold it to the defendants and gave them orders upon the dock company, by which they obtained delivery of the timber. The defendants were innocent purchasers for value. *Held*, the plaintiffs were not responsible for the fraud of their clerk and had never lost title. *Farquarson Brothers & Co.* v. *King & Co.*, [1902] A. C. 325 (H. L.), reversing [1901] 2 K. B. 697. See 2 COLUMBIA LAW REVIEW, 44, where the decision of the Court of Appeal is discussed.

AGENCY—IRREVOCABLE AUTHORITY. The defendant, through a mistake in no way induced by the vendor, became the purchaser at a public auction of a different property from that which he came to buy. On his refusing to sign the memorandum of sale the auctioneer signed it. *Held*, the authority of an auctioneer to sign a memorandum of sale as agent of the highest bidder is irrevocable. *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266.

It was settled by *Emerson* v. *Heelis* (1809) 2 Taunt. 38, that an auctioneer has authority to sign a memorandum of sale as agent for the highest bidder. The doctrine of the principal case that such authority is irrevocable rests merely on *dicta* in *Day* v. *Wells* (1861) 30 Beav. 220, and *Bell* v. *Balls*, [1897] 1 Ch. 663, 672, and is contrary to the ordinary rule that an agency may be terminated at any time. It does not fall within the exceptions that an agent's authority is to be treated as irrevocable where given to secure his interest, or where in pursuance of it the agent has incurred a personal obligation. *Read* v. *Anderson* (1882) 10 Q. B. D. 100; *Hess* v. *Rau* (1884) 95 N. Y. 359. It seems directly contrary to *Farmer* v. *Robinson* (1805) 2 Camp. 339 note, where Lord Ellenborough held that even after a broker had made an authorized sale of goods his authority to sign the memorandum could be revoked.

AGENCY—OSTENSIBLE OWNERSHIP. The plaintiff sent a bond to a broker to sell, together with a transfer deed acknowledging the receipt of payment for the bond. By a statute the bond was transferrable by the registration of the deed. The broker executed a mortgage to the defendant, and delivered to him the bond and deed, which the defendant caused to be registered. The broker absconded with the proceeds of the mortgage. The plaintiff brought a bill in equity praying for a declaration that the bond belonged to him. *Held*, the bond belonged to the defendant. *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

The court refused to adopt the dictum of ASHURST, J., in *Lickbarrow* v. *Mason* (1787) 2 Term. Rep. 63, followed by the Court of Appeal in *Farquharson* v. *King*, [1901] 2 K. B. 697, that "wherever one of two innocent parties must suffer by the acts of a third, he who enabled such third person to occasion the loss must sustain it." See 2 COLUMBIA LAW REVIEW, 44. The plaintiff contended that as the broker has only a power to sell, the defendant could acquire no rights under the mortgage; but the court held that as the plaintiff had entrusted the broker with the *indicia* of ownership with the intention that he should deal with the property towards third parties as if he were the owner, the plaintiff was under a duty towards all who might deal with the broker, to give them notice of any limitations of his authority. *Brocklesby* v. *Temperance Building Soc.*, [1895] A. C. 173. Although the plaintiff's equity was prior in time, the statements in the deed of transfer that the broker had paid value for the assignment was a representation that it was held free of any trust in favor of the plaintiff, and the plaintiff was therefore estopped to assert his equity against the defendant. *Rice* v. *Rice* (1853) 2 Drew. 73.

CARRIERS—LIABILITY OF RAILROAD COMPANY FOR PACKAGE LOST IN U. S. MAILS. A package duly deposited in the United States mails was stolen through the negligence of a servant of the defendant, a railroad company, whose duty it was to carry the mail. *Held*, the defendant was not liable to the sender either as a common carrier or as a bailee for hire. *Banker's Mutual Casualty Co.* v. *M., St. P. & S. S. M. Ry. Co.* (C. C. A., 8th Circ. 1902) 117 Fed. 434.

In *German Bank* v. *Minneapolis, etc., Ry. Co.* (1901) 113 Fed. 414, it was held that the railroad company was not liable to the addressee of mail matter as a common carrier, but the court went on to say that had negligence been proved it might have been held as a bailee for hire. This dictum was not followed in the principal case. The court declared the defendant was a public agent of the United States, and as such was not responsible for misfeasances or nonfeasances of its subagents or servants, provided it had exercised ordinary care in selecting them, *Robertson* v. *Sichel* (1887) 127 U. S. 507; Story on Agency, § 319; and this irrespective of whether the defendant was carrying the mail by virtue of a contract with the United States, or that duty was imposed by statute. This decision has been followed in *Boston Ins. Co.* v. *Chicago etc. Ry. Co.* (Ia. 1902) 92 N. W. 88, and seems clearly correct. See 2 COLUMBIA LAW REVIEW, 410.

CONFLICT OF LAWS—REAL PROPERTY—ASSIGNMENTS FOR BENEFIT OF CREDITORS. A debtor in New York made a voluntary assignment of all his property to the plaintiff for benefit of creditors. Included in the estate was realty in Washington. Subsequent to the New York assignment and its recording in Washington, the defendant, a foreign creditor, levied execution against the property and bought it in. *Held*, in a bill to remove cloud on title, while attachments of local creditors would prevail, the defendant could not acquire the rights of local creditors by availing himself of local process. *Bloomingdale* v. *Weil* (Wash. 1902) 70 Pac. 94.

Foreign assignments for the benefit of creditors are never enforced to the detriment of local creditors when the assignment contravenes the policy of the laws of the forum. *Varnum* v. *Camp* (1833) 13 N. J. L. 326. The decisions are not considered harmonious as to whether foreign cred-

itors should be allowed the rights of domestic creditors by availing themselves of local process. The case in hand follows the majority rule as established by *Bentley* v. *Whittemore* (1868) 19 N. J. Eq. 462. The New York courts are said to hold a contrary rule. *Hibernia Bank* v. *Lacombe* (1881) 84 N. Y. 367. But that case was not entirely analogous, as the assignment was not voluntary.

CONSTITUTIONAL LAW — ELECTIONS — NAMES OF CANDIDATES ON BALLOT. One L, nominated by two parties as a candidate for the same office, demanded that his name be printed on the ballot, under each of the two party designations. The Political Code of California, sec, 1197, provided that the name of a candidate shall be printed only once on the ballot, and, if any candidate is nominated by more than one certificate of nomination, he shall choose under which of the party designations he desires to have his name printed, and underneath the title of the office in the other party column shall be printed in brevier capital type the words "No Nomination." If the candidate shall fail to make the choice, his name shall be placed on the ballot under the party designation named in the certificate first filed. *Held*, the section was unconstitutional, for it interfered with the rights of political parties and the rights of candidates. *Murphy* v. *Curry* (Cal. 1902) 70 Pac. 461. See NOTES, p. 51.

CONSTITUTIONAL LAW—POWER OF THE PRESIDENT TO PARDON CIVIL CONTEMPTS. In *habeas corpus* proceedings it appeared that the petitioner was imprisoned for contempt in disobeying a mandamus directed to him by the U. S. Circuit Court, ordering him to levy a tax to satisfy a judgment. He prayed that the proceedings might be stayed pending his application to the President for a pardon. *Held*, the application was without merit, as the pardoning power of the President does not extend to civil contempts. *In re Nevitt* (C. C. A., 8th Circ. 1902) 117 Fed. 448. See NOTES, p. 45.

CONTRACTS—ILLEGALITY—VIOLATION OF ORDINANCE. A city ordinance prohibited brokers from doing business without a license and imposed a penalty for each violation thereof. An action was brought by the payee of certain notes, part of the consideration for which was services rendered in violation of the ordinance. *Held*, although the ordinance did not expressly declare contracts entered into in violation of it void, it had such effect. *Douthart* v. *Congdon* (Ill. 1902) 64 N. E. 348.

Where the prohibition is express, contracts in violation of a statute or ordinance are of course void. Where there is no express prohibition, but a penalty is imposed, some courts hold that by reason of the penalty attached the statute is by implication prohibitory. *Johnson* v. *Hulings* (1883) 103 Pa. St. 498. But the better rule is that the statute must be looked to as a whole to ascertain whether it was intended as a protection to the public or merely as a fiscal expedient. If the legislature intended to prohibit the act unless done by a qualified person, there can be no recovery for services rendered in violation of it; but if the intention was merely that the person who did it should pay a license fee, the act is not illegal. *Ruckman* v. *Bergholz* (1874) 37 N. J. L. 437; *Harris* v. *Runnels* (1851) 12 How. 79; *Randall* v. *Tuell* (1897) 89 Me. 443.

CONTRACTS—STATUTE OF FRAUDS - INVOLUNTARY SEPARATION OF THE CONTRACT. The plaintiff conveyed mortgaged real estate to the defendant under an oral agreement that the defendant should pay the interest on the mortgage, and, on payment of money lent, reconvey to the plaintiff. By a bill in equity the plaintiff obtained reconveyance and then sued at law for damages for breach of the oral agreement to pay interest. *Held*, the oral contract to pay interest and reconvey was not separable so as to allow an action on one part, the other being within the statute of frauds. *Hurley* v. *Donovan* (Mass. 1902) 64 N. E. 685.

It is well settled that when an agreement is indivisible as to its various stipulations, so long as the stipulation within the statute of frauds remains executory no part of the contract can be enforced. Brown, Stat. of Fr. §§ 140, 144. But when that part to which the statute would have applied has been executed and thus in fact severed from the remainder, an action

may be sustained upon the remaining executory stipulation. *Trowbridge* v. *Wetherbee* (Mass. 1865) 11 Allen, 361; *Tinkler* v. *Swayne* (1880) 71 Ind. 568. The court in the principal case distinguishes between a voluntary and compulsory separation, holding that the part within the statute must have been performed voluntarily, and that the compulsory conveyance under order of the lower court did not put the plaintiff in the same position he would have been in had the defendant willingly performed. The question does not seem to have been raised before. No reason is apparent for the distinction. The court cites no authority which at all supports it. In *Page* v. *Monks* (Mass. 1855) 5 Gray, 496 and *Wetherbee* v. *Potter* (1868) 99 Mass. 354, cited by the court as cases of voluntary separation, the question of the effect of a compulsory separation did not arise.

CONTRACTS—UNCERTAINTY OF SUBJECT MATTER. C, in consideration that plaintiff should be named after him, promised plaintiff's father to convey forty acres of land to plaintiff. Later, C. bought a tract of forty acres and stated that he intended it for plaintiff. No conveyance was made and plaintiff sued to quiet his title. *Held*, the contract was reduced to certainty by the designation of the land. *Daily* v. *Minnick* (Ia. 1902) 91 N. W. 913.

The case proceeds on incorrect principles. The subject matter of the promise, though stated to be land, a thing which is necessarily specific, is entirely uncertain, and no contract arises. *Sherman* v. *Kitsmiller* (Pa. 1827) 17 S. & R. 45; *Pearce* v. *Watts* (1875) L. R. 20 Eq. 492. The maxim "*id certum est quod reddi certum potest*," on which the court relies in order to make the subsequent designation of the land effectual, has no application, as it refers only to the clearing up of ambiguities by extrinsic evidence, *Owen* v. *Thomas* (1834) 3 My. & K. 353, or, according to some courts, where a subsidiary term of the contract is to be fixed by future agreement of the parties. *Alabama G. S. R. Co.* v. *South & N. A. R. Co.* (1887) 84 Ala. 570, 581. None of these cases has gone as far as the present one, however, in the direction of confirming an attempted agreement which was void for uncertainty.

CORPORATIONS—POWER TO RETIRE STOCK IN FAVOR OF BONDS—AMENDMENT OF CHARTER. A general corporation act gave power (a) to retire stock by the purchase of certain shares at a price not above par; (b) to issue bonds; (c) to mortgage its property to secure bonds. The defendant corporation, by a vote of more than the necessary two-thirds of the stock, decided to retire two-fifths of its preferred shares by bonds or their proceeds, so far as any holder of preferred stock should desire. An amendment of the general corporation act, adopted after the incorporation of the defendant, gave express power to do this. A stockholder sued to enjoin the retirement of the stock. *Held*, the retirement by bonds was authorized under the original act by the power to retire by purchase and the power to issue bonds; it did not work a preferential distribution of the capital stock among some of the shareholders to the exclusion of others, because all could benefit if they chose; and the amendatory act was constitutional, being neither special nor an interference with vested rights. *Berger* v. *U. S. Steel Corporation* (N. J. 1902) 53 Atl. 68.

The general incorporation statute of a state reserved the right to alter, amend or appeal. *Held*, such reservation is a part of the contract of every stockholder, and an amendatory act authorizing a change in the relation of the stockholders to the corporation is not unconstitutional as impairing the obligation of contracts. *Venner* v. *U. S. Steel Corporation* (C. C., S. D. N. Y. 1902) 116 Fed. 1012.

Though the cases are of general interest on account of the defendant, no new principles are involved.

CRIMINAL LAW—DOUBLE JEOPARDY. The defendant uttered at the same time and to the same person a forged note and a forged mortgage purporting to secure it. On indictment for uttering the note he pleaded a previous conviction for uttering the mortgage. *Held*, the uttering of the note and mortgage constituted but one criminal act, and conviction on

the first indictment barred prosecution on the second. *State* v. *Moore* (Minn. 1902) 90 N. W. 787.

The case follows the trend of authority. Where one physical act or a series of acts so closely connected as to amount to but one transaction produces several injuries of the same criminal nature against the same person, or even against different persons, only one punishment will be inflicted; as where several articles are stolen at the same time, *Jackson* v. *State* (1860) 14 Ind. 327; where the same shot kills two people, *Clem* v. *State* (1873) 42 Ind. 420; where, as in the principal case, several forged instruments are uttered at the same time, *State* v. *Eggleslit* (1875) 41 Ia. 574. But *contra*, *People* v. *Majors* (1884) 65 Cal. 138; *Commonwealth* v. *Butterick* (1868) 100 Mass. 1. These cases rest on the principle that for one criminal volition there should be but one punishment. They are fairly within the spirit of the rule as to double jeopardy, but are not within the ordinary test. In the principle case, for example, the facts to support the first indictment would not support the second.

CRIMINAL LAW — EXTRADITION — FUGITIVE FROM JUSTICE — REVIEW ON HABEAS CORPUS. The relator in *habeas corpus* was held under an extradition warrant of the governor of New York, issued on the requisition of the governor of Tennessee. It was admitted that he had not been present in the demanding State on the dates stated in the indictment. *Held*, (1) mere constructive presence in the demanding State at the time of the alleged commission of the crime was not sufficient to render him a fugitive from justice, and extraditable; (2) the governor's warrant was reviewable. *People ex. rel. Corkran* v. *Hyatt* (1902) 172 N. Y. 176.

Even though the relator had been in the demanding State subsequent to the crime, he was not a fugitive, the court holds, if he did not depart therefrom to avoid prosecution; thus distinguishing *Adams* v. *People* (1848) 1 N. Y. 173. It is well settled that the accused must have been actually present in the demanding State. *Ex parte Smith* (1842) 3 McLean 121; *In re Mohr* (1883) 73 Ala. 503. As the governor of a State does not act as a United States officer, a State court may review this warrant. *Robb* v. *Connolly* (1884) 111 U. S. 624. The warrant itself is *prima facie* evidence that it is justified. *Ex parte Reggel* (1885) 114 U. S. 642; *Roberts* v. *Reilly* (1885) 116 U. S. 80. But the identity of the accused may be reviewed. *N. Y. Code Crim. Proc.* § 827. Absolute proof that the accused was not a fugitive from justice will rebut the presumption of the warrant. *In re Mohr* (1883) 73 Ala. 503; *Hartman* v. *Aveline* (1878) 63 Ind. 344; *People* v. *Liscomb* (1875) 60 N. Y. 559. His guilt or innocence of the crime charged, however, is not reviewable. *In re Clark* (1832) 9 Wend. 212; *Terlinden* v. *Ames* (1901) 184 U. S. 270. In *Cook* v. *Hart* (1892) 146 U. S. 183, it was held that the question of whether the governor's warrant was conclusive was for the courts of each State to decide.

EQUITY—JURISDICTION OF A FEDERAL COURT TO SET ASIDE A WILL BY FORCE OF A STATE STATUTE. Where a State enactment gave to courts of equity jurisdiction to set aside the probate of wills for fraud or duress, it was *held*, that an original bill thereunder could be maintained in a federal court, there being present the essentials of jurisdiction by the United States courts. *Williams* v. *Crabb* (C. C. A., 7th Circ. 1902) 117 Fed. 193; *Wart* v. *Wart* (C. C., N. D. Ia. 1902) 117 Fed. 766. See NOTES, p. 47.

EVIDENCE—ADMISSIONS. The defendant's horse and trap were in charge of a friend, who so negligently managed the horse that it ran away and injured the plaintiff. To prove that this friend was, in this, the defendant's servant, the plaintiff offered evidence that the day after the occurrence the defendant called upon the plaintiff's daughter, expressed regret that it was his horse that had done the damage, and offered to pay the expenses if she would remove her father from the hospital, where he then was. *Held*, it was error, in default of better evidence, not to nonsuit the plaintiff. *Powell* v. *McGlynn*, [1902] 2 Ir. 154.

The court's view that this offer was perfectly consistent with a motive merely humane, is supported by *Sias* v. *Lighting Co.* (1901) 73 Vt. 35,

where the employment of a nurse to attend the plaintiff, who was the defendant's employee, after the accident, was held to be no admission of liability. In *Thomas* v. *Morgan* (1835) 2 C. M. & R. 496, the exclusion of a somewhat stronger declaration was held not enough to upset a verdict. The obscurity of the report of *Illidge* v. *Goodwin* (1831) 5 C. & P. 190, makes the ruling of TINDAL, C. J., meaningless. *Sayers* v. *Walsh* (1848) 12 Ir. L. R. 434, is distinguishable from the principal case, and, moreover, is *contra* to a decision by LORD ELLENBOROUGH. *Beck* v. *Dyson* (1815) 4 Camp. 197.

EVIDENCE—EXPERT TESTIMONY—HANDWRITING. A handwriting expert was permitted to testify with regard to the cancellation of a will that, in his opinion, testator's signature and a series of perpendicular marks drawn across it with pen and ink nearly ten years after the execution of the will, were not written by the same hand. *Held*, such evidence was inadmissible. *Matter of Hopkins* (1902) 172 N. Y. 360. See NOTES, p. 42.

EVIDENCE—PAROL EVIDENCE TO SHOW CONDITIONAL LIABILITY ON A PROMISSORY NOTE. In an action on a promissory note, between the original parties, the defendant offered evidence of an understanding, when the note was given, that she was not to be liable except in a certain event, which had not occurred. *Held*, admission was error. *Jamestown Business College* v. *Allen* (1902) 172 N. Y. 201.

The case illustrates the important legal results that may flow from what would seem a trifling difference of facts. If the note was delivered conditionally, that is, if it was not to be considered delivered unless a certain event occurred, parol evidence would be admissible to show the condition was never fulfilled; in other words, that the writing had never gone into effect as the contract. *Robertson* v. *Rowell* (1893) 158 Mass. 94; *Blewitt* v. *Boorum* (1894) 142 N. Y. 357; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25. A dissenting opinion took this view. But if the delivery was absolute, no parol evidence could be given to show that the obligation of the contract was conditional, because it would vary a writing which had gone into effect. *Van Syckel* v. *Dalrymple* (1880) 32 N. J. Eq. 233; *Van Etten* v. *Howell* (1894) 40 Neb. 850. Difference of opinion is to be expected on the facts, as the parties themselves, unless lawyers, would hardly distinguish between a conditional delivery and a condition merely in the contract as delivered. *Beard* v. *Boylan* (1890) 59 Conn. 181, is a parallel case decided by a divided court in the same way.

INSURANCE—CONSTRUCTION OF CONDITIONS IN POLICY. A clause of a fire insurance policy provided: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time." *Held*, the clause was valid; and where the plaintiff employed mechanics for more than the agreed period and without the consent of the defendants, such act vitiated the policy, even though the work done did not exceed reasonable repairs. *German Ins. Co. et al.* v. *Hearne* (C. C. A., 3d Circ. 1902) 117 Fed. 289.

The court distinguishes this clause from that in the earlier forms of the fire policy, which were unqualified as to time, and accordingly made it necessary for the courts, in order to give effect to the intent of the parties, to leave to the jury the question of whether only such repairing had been done as was reasonable and did not increase the risk. May, Insurance (4th ed.), § 240; *James* v. *Insurance Co.* (1874) 4 Cliff. 272. Therefore, as the objection to the old form is obviated, it seems better to give effect to the intention as expressed, than to leave the question of reasonableness to the jury.

LANDLORD AND TENANT—IMPLIED COVENANT FOR QUIET ENJOYMENT. The plaintiff was evicted from a leasehold where the tenancy was created by the use of the words "agrees to let," and brought an action for a breach of an implied covenant for quiet enjoyment. *Held*, a covenant for quiet enjoyment does not depend upon the use of any particular words, but is

implied from the existence of the relation of landlord and tenant. *Budd-Scott* v. *Daniell*, [1902] 2 K. B. 351. See NOTES, p. 43.

MASTER AND SERVANT—FELLOW SERVANTS. A laborer assisting in making an excavation was sleeping, while his "shift" was off duty, in a tent near the work, a lodging which he received as part compensation for his services. He was injured owing to the negligence of one of the workmen on duty, in not giving him warning of a blast. *Held*, the fellow-servant doctrine had no application to exonerate the defendant, inasmuch as, at the time of the accident, the plaintiff was not a fellow servant of the other servants. *Orman* v. *Salvo* (C. C. A., 8th Circ., 1902) 117 Fed. 233. See NOTES, p. 49.

MUNICIPAL CORPORATIONS—LIABILITY FOR STREETS—DEFECTIVE PLAN. The plaintiff was injured by a drain hole in a gutter, constructed according to plans approved by the municipality but shown to be dangerous to passers-by. *Held*, the city cannot escape liability on the ground that the defect was part of the original plan of construction. *Stone* v. *City of Seattle* (Wash. 1902) 70 Pac. 249.

The decision accords with the more approved doctrine of municipal liability. *Urquhart* v. *City of Ogdensburg* (1883) 91 N. Y. 67, lends considerable support to the opposing view. There judgment was given for the city on the ground that the adoption and approval of plans are judicial acts, while in regard to its streets a municipality is answerable only for ministerial acts. The decision is based largely on *Lansing* v. *Toolan* (1877) 37 Mich. 152; but erroneously so, for in Michigan there is no implied responsibility for unsafe streets. The soundness of the case at issue depends upon the answer given to the question as to whether the principle that actionable negligence cannot be predicated of the plan itself should be carried to far as to exempt from liability if that plan actually leaves the streets in an unsafe condition. Principle should answer in the negative. 2 Dillon on Munic. Corp. (4th ed.) § 1024, note.

NEGOTIABLE PAPER—IMPUTED NOTICE OF DISHONOR—SAME PERSON ACTING AS SECRETARY OF TWO COMPANIES. The A company drew a bill of exchange on the B company and indorsed the bill to the C company. The bill was dishonored. No express notice of dishonor was given by the C company to the A company. The same person was secretary of both the A and B companies, and, in his capacity as secretary of the latter, knew of the dishonor. *Held*, notice of dishonor could not be imputed to the A company, since the secretary was under no duty to communicate it. *In re Fenwick, Stobart, and Co.*, [1902] 1 Ch. 507.

The combination of circumstances in the principal case appears novel; but the decision may be supported on reasoning of *In re Marseilles Extension Railway Co.* (1871) L. R. 7 Ch. 161, and *In re Hampshire Land Co.*, [1896] 2 Ch. 743. A different rule was laid down in *The Distilled Spirits* (1870) 11 Wall. 356, and cases following it. Where the giving of notice would constitute a breach of confidential relations, the correctness of the rule is universally admitted. The English decision is to be preferred, because notice should be imputed only as to those facts, a knowledge of which has been gained within the scope of the agency.

REAL PROPERTY—COVENANTS RUNNING WITH THE LAND. A partnership leased land from a railroad company and covenanted to save the lessor harmless from all liability for damage by fire. The firm continued in possession after the expiration of the lease and was later reorganized through the retirement of one partner. The new firm insured its property on the premises by a policy which was to be void if the insured had any contract to exempt any person from liability for fire. *Held*, the covenant to indemnify the railroad company ran with the land so as to bind the new firm and become a defence to an action on the policy. *Kennedy* v. *Iowa State Ins. Co.* (Ia. 1902) 91 N. W. 831.

The case is interesting as an extreme application of the doctrine as to covenants running with the land. *Railway Co.* v. *McClure* (1899) 9 N.

Dak. 73, holding that the benefit of such a covenant passes with the reversion, is the only decision directly in point. The precedents here cited—such as covenants by the lessee to insure; *Vernon* v. *Smith* (1821) 5 B. & Ald. 1; *Masury* v. *Southworth* (1859) 9 Ohio St. 11, 340; by the lessor to compensate for improvements, *Ecke* v. *Fetzer* (1886) 65 Wis. 55, or not to carry on a certain trade, *Norman* v. *Wells* (1837) 17 Wend. 136, 151,- do not justify the conclusion reached, as in all of them the covenants, if not directly benefitting the land, were made for the advantage of landlord or tenant as possessors of an interest therein. Here the evident purpose of the covenant was to indemnify the company not in its capacity of landlord, but as the operator of the railroad adjoining the premises, and it should have been regarded as a mere collateral promise. As the possibility of a covenant's running with the land depends wholly on its nature, the intention of the parties and the use of the word "assigns" were immaterial.

REAL PROPERTY—EQUITABLE EASEMENTS—QUIT CLAIM DEEDS. A deed of land from the plaintiff to the defendant contained a covenant restricting the use of the land. Subsequently, owing to a dispute over the title to premises of which this lot had been part, the plaintiff gave the defendant a quitclaim deed of the whole parcel. *Held*, the equitable easement created by the restrictive covenant was released. *Uhlein* v. *Mathews* (1902) 172 N. Y. 154.

The point seems to be new. Restrictive covenants are frequently spoken of as easements, *Beals* v. *Case* (1884) 138 Mass. 140, but this language has been criticised. *De Gray* v. *Monmouth Beach Club House Co.* (1892) 50 N. J. Eq. 329, 339. Even to call them equitable easements does not intimate that they are interests in land in the technical sense. In New Hampshire, it is true, restrictions must be created by deed, *Tibbetts* v. *Tibbetts* (1890) 66 N. H. 360, and an early New York case held them void under the statute of frauds, unless in writing. *Wolfe* v. *Frost* (1846) 4 Sandf. Ch. 72. But later New York cases have paid no attention to this requirement. *Tallmadge* v. *East River Bank* (1862) 26 N. Y. 105; *Lewis* v. *Gollner* (1891) 129 N. Y. 227. On the other hand, a restrictive agreement has been held a conveyance of real estate within the New York recording acts, and not entitled to record unless properly acknowledged. *Bradley* v. *Walker* (1893) 138 N. Y. 291. And the existence of a restriction is a breach of a covenant against encumbrances. *Green* v. *Creighton* (1861) 7 R. I. 1; *Locke* v. *Hale* (1895) 165 Mass. 20.

RECEIVERS—LIABILITY FOR RENT. Among the assets of which a receiver was ordered to take charge was a leasehold estate. To the lessor's demands for rent the receiver returned evasive replies, until finally he offered to surrender the premises to the lessor on certain conditions. The leasehold was not included in the receiver's sale ordered by the court. Thereafter, on intervention by the landlord, it was *held*, the receiver was liable for rent from the date of his offer above stated to the date of the decree, according to the terms of the lease, and the receiver must forthwith surrender possession of the premises to the lessor. *Dayton Hyd. Co.* v. *Felsenthal* (C. C. A., 6th Circ. 1902) 116 Fed. 961. See NOTES, p. 53.

SURETYSHIP—CONTRACT OF INDEMNITY—JUDGMENT. The plaintiff signed a bond as surety, and the defendant orally promised to repay him "any sum which he might be obliged to pay as surety." Judgment was rendered against the surety. *Held*, the indemnitor, when sued, might show that the judgment was not warranted, the plaintiff having a good defense. *Gorman* v. *Williams* (Ia. 1902) 91 N. W. 819.

The real question to be determined in the case of a promise to indemnify is, what losses or liabilities the promise was intended by the parties to cover. It may be a promise generally to save harmless from a liability, or a promise to indemnify against a judgment. In the first class of cases the indemnitor is entitled to notice of the suit and an opportunity to defend; if he is not notified, the person indemnified may still recover, but the judgment is only *prima facie* evidence of a liability. *Bridgeport*

Ins. Co. v. *Wilson* (1866) 34 N. Y. 275. In the second class, the rendition of the judgment is sufficient to establish his liability. *Conner* v. *Reeves* (1886) 103 N. Y. 527. From the case last cited, it would seem that in the second class of cases a judgment by default is not conclusive. In a recent case, however, *City of N. Y.* v. *Baird* (1902) 74 App. Div. 238, it was held that the person indemnified might settle a suit against the protest of the indemnitor. But see the discussion thereon in 2 COLUMBIA LAW REVIEW, 498.

TAXATION—TRANSFER TAX—CONTINGENT INTERESTS. § 230 of the New York Tax Law, Laws of 1896, c. 908, as amended by Laws of 1899, c. 76, provided that where property was transferred in trust, and the rights, interests, or estates of the transferees were dependent on contingencies, a tax should be imposed on such transfer immediately. *Held*, the tax was still one on succession and might be collected at the death of the testator. *Matter of Vanderbilt* (1902) 172 N. Y. 69.

The intention of the legislature was not disputed, but serious objections were raised to the practicability and constitutionality of such an enactment. It was said that there was no true transfer of a beneficial interest at the time of the testator's death when the enjoyment is postponed until the happening of some contingency. But it is settled in New York that even contingent interests in property cannot be destroyed or impaired by legislative enactment. *Brevoort* v. *Grace* (1873) 53 N. Y. 245. The analogy of manual delivery is therefore not applicable to the transfer of such interests, as they have an existence before they vest in possession; and it seems possible for the legislature to regard the passing of the estate away from the testator as a succession for the purposes of taxation There is the further difficulty, it is true, that the tax in such cases must be collected out of the property itself, and so comes near to being a tax on property and not on succession. The view taken of such a tax, however seems to be that its imposition is in the nature of a condition precedent to the acquisition of the property by heir or legatee. GRAY, J., in *Matter of the Estate of Swift* (1893) 137 N. Y. 77; *United States* v. *Perkins* (1895) 163 U. S. 625. The effect of the tax is not to appropriate property already held by any beneficiary, but merely to intercept a part on its way to him. It is true, as pointed out in the still more recent case of *Matter of Brez* (1902) 172 N. Y. that the practical effect is often unduly to diminish the value of the life tenant's estate; but the court also held, in accordance with the principle just stated, that this was a matter of policy, and did not prevent the law from being constitutional.

TAXATION—ASSESSMENT NOT IN ACCORDANCE WITH STATUTE—INJUNCTION. Real estate in New York City was assessed at 60 per cent. while personal property was taxed at its full value. The New York statute, 1 R. S. 393 § 17, provides that all real and personal estate shall be estimated and assessed at its full and true value. The plaintiff sought to enjoin the collection of taxes on bank shares, on account of the inequality. *Held*, the injunction would not be granted. *Mercantile Nat. Bank* v. *Mayor, etc. of New York* (1902) 172 N. Y. 35.

The decision harmonizes with the principle that courts look with disfavor on injunctions against tax collections unless the case is brought clearly within some head of general equity jurisdiction. *Susquehanna Bank* v. *Supervisors* (1862) 25 N. Y. 312. As the decision of a board of assessors is judicial, it will not be reviewed in equity when merely erroneous. *Western R. Co.* v. *Nolan* (1872) 48 N. Y. 513. Although a mandatory statute had been violated, the assessors had acted within the sphere of their powers. An injunction moreover would have the impractical effect of invalidating the whole assessment. Even where a species of property has been entirely omitted from taxation the assessment has been held valid. *People* v. *McCreery* (1868) 34 Cal. 432, 457. A result similar to the principal case was reached on a somewhat similar state of facts in *Van Deventer* v. *Long Island City* (1893) 139 N. Y. 133, although it was admitted that there was no remedy by the statutory certiorari.